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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1099

BANGOR AND AROOSTOOK RAILROAD COMPANY, ET AL., *Petitioners,*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

BRIEF IN OPPOSITION

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Counterstatement of Questions Presented

1. Whether in Railway Labor Act disputes the Norris-LaGuardia Act is applicable to the extent that its Section 8 "clean hands" requirement bars grant of anti-strike injunctions to carriers violating the Railway Labor Act's basic bargaining duty?

2. Whether compensatory contempt damages may be awarded for violation of an injunction which was erroneously issued in disregard of Section 8 of the Norris-LaGuardia Act?

Counterstatement of the Case

This case involves an effort by petitioning carriers to collect compensatory contempt damages on account of a strike provoked by their own violations of the Railway Labor Act, and on the basis of strike injunctions erroneously issued in disregard of the "clean hands" bar in Section 8 of the Norris-LaGuardia Act. The circumstances

giving rise to the strike and the injunctions may be succinctly stated.

During the two-year life of the Award under Public Law 88-108, the BLF&E earnestly sought to negotiate the work rules and manning rights to apply upon the expiration of the Award on March 31, 1966. To facilitate timely agreement, in the fall of 1965 the BLF&E served three bargaining notices on the carriers, the most important of which was unquestionably Notice No. 1 covering the subject of levels of fireman manning to apply upon expiration of the Award. The carriers, however, refused to bargain with the BLF&E during the period of the Award, although Congress had hoped and anticipated that during that period the parties would come to agreement settling their differences on the manning issue,[1] and even though the carriers had unequivocally promised Congress to undertake such bargaining.[2] See *infra*, Appendix A, at p. 18.

[1] That theme is found in the preamble recitation of Public Law 88-108 that it is desirable to achieve the stated objectives of the law "in a manner which preserves and prefers solutions reached through collective bargaining," and is emphasized throughout the legislative history. The precipitating message by President Kennedy urged a Congressional enactment which would encourage "the parties to achieve their own solutions through collective bargaining" and provide "for an interim remedy while awaiting the results of further bargaining by the parties." 109 Cong. Rec. 13004, 13006. Senator Morse underlined that the two-year arbitration "would encourage and stimulate the parties to continue to bargain in order to develop final solutions . . ." 109 Cong. Rec. 15976. Secretary of Labor Wirtz made the same point in his Senate testimony, when in response to Senator Pastore's question about the temporary nature of the arbitration he said: "I would assume, Mr. Chairman, in complete good faith within that two-year period the parties would have worked out the resolution of this matter." Hearings before the Senate Committee on Commerce, on S.J. Res. 102, 88th Cong., 1st Sess., 49-50. This Court underlined this clear Congressional intention when it noted that the President had recommended legislation "for an interim remedy while awaiting the results of further bargaining by the parties." *Engineers* v. *Chicago, R.I. & P.R. Co.*, 382 U.S. 423, 431 (1966).

[2] Chairman James E. Wolfe of the National Railway Labor Conference stated before the Senate Committee that during the two-year period "the parties themselves, as they eventually will have to do some time or another,

The BLF&E was presented with a serious dilemma by the carriers' refusal to bargain. The situation was aptly characterized in statements which the carriers themselves submitted to the District Court in their subsequent application for an anti-strike injunction. As the carriers set forth in the affidavit of James E. Wolfe (pp. 26-27 of Joint Appendix in No. 20,316 in the Court below): "Frank C. Porter of the Washington Post reported in the January 19 issue of that newspaper that: 'President H. E. Gilbert of the Brotherhood of Locomotive Firemen and Enginemen, AFL-CIO said a strike could come March 31 *if the carriers refuse to bargain* on restoration of firemen to freight and yard engines' . . . 'D. C. (Del) Deering, Vice President of the AFL-CIO Brotherhood of Locomotive Firemen and Enginemen said in an interview . . . that the Santa Fe, Southern Pacific and four other railroads will be struck March 31 *unless management agrees to negotiate* for restoration of the jobs of firemen.'" (emphasis supplied).

The BLF&E determined that, in view of the carriers' bargaining refusal, its only recourse was to strike. Thereupon, just prior to the Award's expiration the carriers obtained from Judge Holtzoff a temporary anti-strike restraining order on March 28, 1966, and then a supplemental temporary restraining order on March 31, 1966. Judge Holtzoff declined to entertain the BLF&E objection that "the carriers have at all times refused to bargain, thereby violating Section 8 [of Norris-LaGuardia]" because, as the carriers concede (Pet. p. 8), he "held Norris-LaGuardia in its entirety to be inapplicable" to controversies under the Railway Labor Act.

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will finally dispose of these . . . disputes by collective bargaining." Indeed, Mr. Wolfe *promised* the House Commerce Committee that "we will be willing to bargain under any circumstances." Hearings before the Senate Committee on Commerce, on S.J. Res. 102, 88th Cong., 1st Sess. 364 (1963); hearings before House Committee on Commerce, on H.J. Res., 565, 88th Cong., 1st Sess., 559 (1963).

Thereafter, in its decisions of May 12 and July 31, 1967, the Court of Appeals found the carriers to have been guilty of refusal to bargain as required by the Railway Labor Act, and to have been precluded from the injunctive relief granted by Judge Holtzoff by virtue of the "clean hands" bar in Section 8 of the Norris-LaGuardia Act. The relevant portion of the May 12, 1967 opinion holding the carriers to have been in violation of the Railway Labor Act bargaining duty appears in Appendix A, *infra*, p. 17. There the Court of Appeals rejected the carriers' contention that during the life of the Award they were freed from their collective bargaining duties under the Railway Labor Act (*infra*, at p. 19). Accordingly, the Court ruled (*infra*, at pp. 22-23) that since "the carriers flatly refused to engage in any statutory bargaining whatever prior to the expiration date . . . the carriers before us must be held to have breached their statutory duty under the Railway Labor Act to confer and bargain on the merits of proposed changes in work rules."

Recognizing that its May 12, 1967 opinion did not decide all the issues, the Court of Appeals invited the parties to brief the relevant remaining questions (385 F. 2d at p. 605). Among the issues then briefed and subsequently disposed of in the Court's Supplemental Opinion of July 31, 1967, was the impact of its finding of unlawful carrier refusal to bargain upon the validity of the injunctive relief issued by Judge Holtzoff. The question arose specifically over the trainmen's request for recovery on their injunction bond. They based their claim on the ground that Judge Holtzoff's injunction had been issued in violation of Section 8 of the Norris-LaGuardia Act, which bars injunctive relief to a party in a labor dispute who has not met his bargaining obligations.

The portion of the July 31 opinion disposing of the Section 8 question is set forth in Appendix B, *infra*, p. 24. There the Court of Appeals allowed recovery by the union on the injunction bond, finding that "the restraining order was erroneously entered" since Judge Holtzoff had disregarded Section 8 of Norris-LaGuardia (*infra*, p. 26). As the Court succinctly put it (infra, p. 24), the District Court "erred" in issuing its restraining order "because—as we have subsequently held in our May 12, 1967 ruling—the complainant carriers had failed to comply with their obligations under the Railway Labor Act." As the Court emphasized, accommodation of the requirements of Section 8 with those of the Railway Labor Act is a principle confirmed by rulings of this Court and lower courts (*infra*, p. 25, n. 4) and application of Section 8 of Norris-LaGuardia "*would not trammel but would rather further the effectuation of that Railway Labor Act; for it ensures compliance by complainant carrier or union which cannot seek an injunction until and unless it has discharged the obligations imposed by the Railway Labor Act*" (*infra*, p. 25; emphasis supplied.)[3]

[3] In view of the clear applicability of Section 8 there was no need for determination in the Court below whether the BLF&E strike which was enjoined by Judge Holtzoff was in any sense illegal, but we cannot refrain from noting the clear error in the carriers' claim that it was. The authorities make quite clear that a union may lawfully strike if a carrier refuses to honor its Railway Labor Act obligations. As the Court of Appeals emphasized in *United Industrial Workers v. Board of Trustees of Galveston*, 400 F. 2d 320, 334 (5th Cir. 1968) *cert. denied*, 395 U.S. 905: "If the carrier refuses to follow the procedures of the Act, or if those procedures are followed to an impasse, the Union may strike. The Union's right to bargain, guaranteed by the Act, 45 U.S.C. § 152, Fourth, and presently enforced by this Court, would be illusory without a right to strike when bargaining has run its course if the Carrier continues to refuse to bargain."

Similarly, in *Florida East Coast Railway Co. v. Brotherhood of Locomotive Engineers*, 362 F. 2d 482, 485-86, the Court rejected a claim that the Union was barred from striking when the carrier had failed to comply with the Railway Labor Act: "The action of the Unions in striking, was

While the ruling concerning the invalidity of Judge Holtzoff's grant of injunctive relief was over an issue particularly involving the trainmen, the holding clearly rendered equally invalid the injunctions contemporaneously issued by Judge Holtzoff against the BLF&E. Accordingly, the BLF&E moved for dismissal of the pending compensatory contempt proceeding wherein the carriers sought to recover damages for alleged violations of Judge Holtzoff's injunctions against the BLF&E. Judge Holtzoff, however, denied dismissal of the compensatory contempt proceeding on the erroneous view that the doctrine of the *Mine Workers* case permits not only punitive but also compensatory contempt awards based on an invalid injunction (see Pet., p. 29).

On February 28, 1969, in the decision the carriers now proffer for review, the Court below reversed Judge Holtzoff. In its decision, the Court reemphasizes (see Pet., p. 33) its earlier holding that in issuing the injunctions "the District Court acted improperly in the exercise of its jurisdiction when it did not heed the 'clean hands' provision of § 8 [of Norris-LaGuardia]". The Court below holds that the compensatory contempt proceeding must be dismissed because (Pet., p. 31) "in a 'compensatory' civil contempt proceeding . . . the alleged contemnor establishes a defense if

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not in derogation of the processes of the Railway Labor Act. It was in support of the Act. The unions were not striking to change rules, pay rates, or working conditions; they were striking because the carrier had violated the Act by making such changes without following the statutory procedure required in the Act. They did not have unclean hands under these circumstances . . ." See also *Telegraphers* v. *Chicago and Northwestern R. Co.*, 362 U.S. 330, 338-341 (1960), rejecting the carrier's contention that the strike was "unlawful"; Comment, *Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes*, 60 Colum. L. Rev. 381, 389, fn. 51 (1960). Cf. *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270 (1956). Thus it is clear from the decisional law that the BLF&E did not in fact transgress the Railway Labor Act when it was provoked to resort to self help by the carriers' violation of their statutory bargaining duty.

he successfully challenges the propriety of the underlying order. The lack of propriety of the restraining order is established by this court's [1967] ruling on the merits . . ." We demonstrate hereinafter that, contrary to the carriers' suggestion, the Court below acted quite properly, both in holding that application of Norris-LaGuardia Section 8 "would not trammel but would rather further the effectuation of the Railway Labor Act", and in its holding that the erroneous issuance of the underlying injunction, in disregard of Section 8, removed the predicate for award of any compensatory contempt damages.

REASONS FOR DENYING THE WRIT

I

The Court Below Has Properly Followed The Norris-LaGuardia Accommodation Principle Repeatedly Approved And Applied By This Court.

Applying the "clean hands" requirement of Norris-LaGuardia's Section 8, the Court below held that carriers flaunting the Railway Labor Act duty of collective bargaining were not entitled to injunctions prohibiting a strike by the rebuffed union. In so doing, the Court of Appeals expressly applied this Court's "accommodation" principle, which seeks to give effect to the Norris-LaGuardia Act except where to do so would nullify a specific provision of a subsequently enacted labor law. Here the Court of Appeals found *confluence* rather than *conflict* between the Railway Labor Act's bargaining duty (violated by the carriers) and the thrust of Norris-LaGuardia's Section 8 which denies injunctive relief to a party violating that duty.

Having already been denied review of that ruling below (No. 863, Oct. Term, 1967), the carriers are here for a second try. They again attack the accommodation ruling below, asserting that this Court has generally held Norris-La-

Guardia inapplicable to the Railway Labor Act disputes (Pet. pp. 19-20). They claim that a "clear line of demarcation" will be obscured if federal courts engage in "separate and diverse 'accommodation' of each provision of Norris-LaGuardia even in circumstances where enforcement of the mandates of the Railway Labor Act is involved, rather than disregarding Norris-LaGuardia in its entirety . . ." (Pet. 21-22). But, contrary to the carriers' claim, this Court has long approved and applied an accommodation principle which *seeks to give effect* to Norris-LaGuardia even in labor disputes generally regulated by subsequently enacted federal statutes, except where to do so would nullify a specific and important provision of the later statute. Thus, the Court has upheld the application of Norris-LaGuardia not only to labor disputes which may involve a violation of the Sherman Act (*Milk Wagon Drivers' Union* v. *Lake Valley Farm Products*, 311 U.S. 91, 103 (1940), but also to those under the Railway Labor Act (*Telegraphers* v. *Chicago & N.W. Ry. Co.*, 362 U.S. 330 (1960); *Brotherhood of Railroad Trainmen* v. *Toledo P.&W.R. Co.*, 321 U.S. 50 (1944)[4]

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[4] The Courts of Appeals have emphasized that the Norris-LaGuardia Act "prohibits the issuance of an injunction in a railway labor case involving a 'major dispute.'" *Butte, Anaconda & P. Ry. Co.* v. *Brotherhood of Loc. Fire. & Eng.*, 268 F. 2d 54, 58 (9th Cir. 1959). They have uniformly recognized the limitations which Norris-LaGuardia imposes upon the power of District Courts to issue injunctions restraining strikes when "major disputes" under the Railway Labor Act are involved. *Brotherhood of Railroad Carmen* v. *Chicago & N.W. Ry. Co.*, 354 F. 2d 786 (8th Cir. 1965); *Missouri-Illinois R. Co.* v. *Order of Railway Conductors*, 322 F. 2d 793 (8th Cir. 1963); *Pullman Company* v. *Order of Railway Conductors & Brakemen*, 316 F. 2d 556 (7th Cir. 1963), *cert. denied*, 375 U.S. 820 (1963); *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers*, 307 F. 2d 21 (2d Cir. 1962). Cf. *Sinclair Refining Company* v. *Atkinson*, 290 F. 2d 312 (7th Cir. 1961), aff'd, 370 U.S. 195 (1962). The present issue, of course, arose from the "major dispute" over the BLF&E's bargaining proposals which the carriers refused to negotiate.

and under the National Labor Relations Act (*Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195; *Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437, 442; cf. *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 429, n. 15).

Soon after Norris-LaGuardia, Congress enacted the 1934 Railway Labor Act provisions and the 1935 National Labor Relations Act, without specifically purporting either to limit or preserve application of the Norris-LaGuardia Act's restrictions on injunctive relief to parties. The inevitable question of statutory construction concerning injunctive enforcement of the later statutes' provisions came before this Court in *Virginian Railway Co.* v. *System Federation*, 300 U.S. 515, 563 (1937). This Court, in approving the District Court's injunction requiring the employer to bargain with the union certified by the National Mediation Board, found the employer's Norris-LaGuardia objections "strained and unnatural constructions" conflicting with that Act's "declared purpose". It went on to warn that in any event "the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of Section 2, Ninth, of the Railway Labor Act . . . Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act." This basic accommodation rule announced in *Virginian Railway*—seeking to give effect to the Norris-LaGuardia Act "so far as its provisions are found not to conflict" with specific rights incorporated in subsequent labor legislation—has been consistently followed by this Court in subsequent railway labor cases.

Thus, in *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W.R. Co.*, 321 U.S. 50 (1944), Norris-LaGuardia was held to bar a District Court injunction against union acts of theft and violence threatening company property and operations. There the carrier had refused to arbitrate the

underlying bargaining dispute under the Railway Labor Act, thus invoking the stricture of Section 8 of Norris-LaGuardia that a party seeking injunctive relief in a labor dispute must first have made "every reasonable effort" to settle the dispute. This Court found as concerns Section 8 (321 U.S. at p. 56) that the carrier's *"steadfast refusal to agree to arbitration under the Railway Labor Act's provisions made the section operative."* Moreover, the Court specifically answered the objection that by application of Section 8 it was in effect requiring the carrier to accept an arbitration procedure which the Railway Labor Act does not make mandatory. In that respect, it noted (321 U.S. at p. 57, n.12) that when Norris-LaGuardia was enacted the original Railway Labor Act of 1926 was already in force, and continued (at p. 58):

> "Section 8 is not limited to railway labor disputes. But it includes them. And its very terms show they were used in explicit contemplation of the procedures and machinery then existing under the Railway Labor Act and with the intent of making their exhaustion conditions for securing injunctive relief, not singly or alternatively, but conjunctively or successively, when available. This purpose of Congress is put beyond question when the section's legislative history is considered in the light of the history and the basic common policy of the two statutes, the Railway Labor Act and the Norris-LaGuardia Act. The policy of the Railway Labor Act was to encourage use of the nonjudicial processes of negotiation, mediation and arbitration for the adjustment of labor disputes . . . The over-all policy of the Norris-LaGuardia Act was the same."

The Court further underscored (at p. 56) the direct nexus between arbitration under the Railway Labor Act and Norris-LaGuardia's clean hands rule: "Clearly arbitration

under the Act was a method, both reasonable and available, which respondent refused to employ, not once, but repeatedly and adamantly. If it had been used, it would have averted the strike, the violence which followed, and the need for an injunction." Obviously, if refusal of arbitration (which is not mandatory) brings Section 8 into operation, refusal to bargain (which is mandatory) is an even more compelling reason for that result.

The accommodation principle is confirmed also by the subsequent rulings in the *Trainmen* (Chicago River) and *Telegraphers* decisions. In *Trainmen* v. *Chicago River & I.R. Co.*, 353 U.S. 30 (1957) this Court found the Railway Labor Act's compulsory arbitration procedure in minor dispute cases to require, notwithstanding Norris-LaGuardia's anti-injunction policy, that District Courts enjoin a union "from striking to defeat the jurisdiction of the Adjustment Board" while a minor dispute is pending before the Board (353 U.S. at p. 39). But in so doing, the Court again emphasized the general accommodation principle (at p. 40):

> "We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable."

More recently, in *Telegraphers* v. *Chicago & N.W. Railway*, 362 U.S. 330 (1960), this Court held that Norris-LaGuardia's anti-injunction provisions apply to bar judicial restraint of a strike in aid of union bargaining demands asserted pursuant to the Railway Labor Act. The *Trainmen* case was explained as an exception to the accommodation principle, where a strike injunction was

authorized "to prevent a plain violation of a basic command of the Railway Labor Act . . ." (362 U.S. at 339). "Here, far from violating the Railway Labor Act," the Court continued in *Telegraphers*, "the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes . . ." [5]

In the present case the Court of Appeals has followed the accommodation principle announced in *Virginian Railway*, affirmed in *Trainmen*, and applied in the *Toledo* and *Telegraphers* decisions. The holding below that carriers cannot wrongfully refuse to bargain and then obtain injunctions against the union's recourse to a strike is predicated precisely upon the point emphasized in *Toledo*, that Section 8 of Norris-LaGuardia does not undermine but actually supports the common purpose of both Acts *"to encourage use of the nonjudicial processes of negotiation . . ."* The Court of Appeals sought to give vitality to the collective bargaining mandate by subjecting carriers who flaunted that Railway Labor Act obligation to the clean hands rule of Norris-LaGuardia. The decision below thus gives effect to "the basic common policy of the two statutes, the Railway Labor Act and the Norris-LaGuardia Act" (321 U.S. at

[5] There is no merit to the petitioners' suggestion that the ruling below conflicts with that of the Tenth Circuit in *Brotherhood of Railroad Trainmen* v. *Denver & R.G.W.R. Co.*, 290 F. 2d 266 (1961), *cert. denied*, 366 U.S. 966. That case involved an injunction against a strike over the carrier's refusal to pay an Award of the Adjustment Board. It appears (see Petition in No. 979, Oct. Term 1960, p. 19) that the Section 8 claim was based on the railroad's non-payment of the Award—certainly a dubious contention under that section. In any event, all that the Court held in rejecting the Section 8 claim was that the mandatory Adjustment Board procedure, which this Court vindicated in the *Trainmen* case by approving an injunction, remains the exclusive procedure at the subsequent stage of judicial review. The Tenth Circuit opinion relies on the *Trainmen* ruling, and is simply a logical corollary of its principle that the statutory minor dispute arbitration procedure may be protected by judicial injunction.

p. 58). The radical departure of the carriers from the decisions of this Court would irrationally inhibit operation of Norris-LaGuardia and equally disserve the key purpose of the Railway Labor Act, for it would reward a nonbargaining carrier by enjoining the strike provoked by its own statutory violation. The result approved below is in every sense appropriate and there is no ground for reconsideration here of this Court's well established accommodation doctrine.

II

Since the Underlying Injunction Was Improperly Issued In Disregard Of Section 8 Of Norris-LaGuardia, No Predicate Remains For Award Of Compensatory Contempt Damages.

In its ruling in *United States* v. *United Mine Workers*, 330 U.S. 258, 294-295 (1947), this Court definitively ruled that, although the invalidity of the underlying injunction may still permit punitive contempt proceedings, it precludes the possibility of compensatory contempt relief. The Court warned that "it does not follow" from the rule applicable in punitive contempt that a plaintiff "may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. The right to remedial relief falls with an injunction which events prove was erroneously issued . . ." As the Court of Appeals ruled on July 31, 1967 (see *infra*, Appendix B, p. 24) and re-emphasized in the decision now before this Court (Pet. at p. 33), "the District Court acted improperly in the exercise of its jurisdiction when it did not heed the 'clean hands' provision of Section 8 [of Norris-LaGuardia]" since the nonbargaining carriers were not entitled to injunctive relief. Applying the self-evident principle confirmed by *Mine Workers*, the Court below dis-

missed the carriers' compensatory contempt proceedings because "the railroads' right to compensation depends on their establishing a private right to the injunctive relief, and in this case that right was negatived by their own unlawful refusal to bargain . . ." (Pet., p. 33).

The carriers, however, urge (Pet., p. 15) that in this case the flaw in the issuance of the underlying injunctions was merely "technical error" which should not cause invocation of the *Mine Workers* limitation. But their plea of technicality hardly merits serious consideration. Thus, in the "coercive contempt" proceeding in the Court below (No. 20,316, *BLF&E* v. *Bangor & Aroostook R. Co.*, 380 F. 2d 570 (1967), *cert. denied*, 389 U.S. 327) the carriers' brief (pp. 26-31) confessed that "sound reasons" support this Court's pronouncement in *Mine Workers* "that a civil compensatory fine cannot stand after reversal of the underlying order." As the carriers conceded, *"Of course a plaintiff may not profit by way of a civil contempt fine for damages sustained through violation of a Court order, if the order is later determined invalid, since he could not have suffered damages in a legal sense."* Now, however, the carriers would dismiss as a dictum intended to have only limited application, this Court's emphasis in *Mine Workers* that "the right to remedial relief falls with an injunction which events prove was erroneously issued." Petitioners suggest (Pet., p. 25) that this Court meant to bar compensatory contempt only where it is established that the underlying injunction should have been denied "on the merits rather than because of some correctable procedural or evidentiary irregularity."

In response to that remarkable suggestion perhaps it should suffice that just as science repels the concept of partial pregnancy our legal system knows no principle of partial illegality. When the carriers urge that the invalidity

of the underlying injunctions be overlooked because under different circumstances the judicial error might have been avoided, they proffer an argument too conjectural for practical application. When for any reason an injunction for whose violation damages are sought has finally been held erroneous, there simply remains no valid judicial order to support compensatory contempt relief and it is quite beside the point what might have happened had the court avoided the error which invalidated its injunction.

In any event, there remains the plain fact in this case that the District Court's disregard of Norris-LaGuardia simply cannot be dismissed, as the carriers would dismiss it, as some "correctable procedural or evidentiary irregularity". The clean hands requirement of Section 8, as this Court emphasized in *Toledo* (see *supra*, p. 10), is not a procedural nicety but a substantive rule incorporating a vital Congressional policy reflected both in Norris-LaGuardia and the Railway Labor Act. As the Court put it, the requirement for exhausting all avenues of bargaining and negotiation is a *"basic common policy"* of the Railway Labor Act and Section 8 of Norris-LaGuardia.

Thus, a District Court which issues an injunction in disregard of Section 8 of Norris-LaGuardia commits fundamental and substantive error. The statute denies to carriers flaunting the Railway Labor Act's bargaining requirement an injunction against a strike provoked by their law violation. That they should nevertheless have compensatory damages based upon the injunction erroneously issued is a result precluded by *Mine Workers*, by the general doctrine of "clean hands", and the salutary principle that no man shall profit from the consequences of his own wrongdoing (*Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231). The carriers having provoked a strike by violation of their bargaining obligations, they cannot shift to the union the

consequences flowing from their precipitating statutory violation.

Conclusion

Both of the legal principles the carriers now challenge emanate from historic decisions of this Court. In *Virginia Railway* the Court announced the Norris-LaGuardia accommodation principle which it has consistently followed since 1937, and in *Mine Workers* it affirmed the self-evident principle precluding compensatory contempt relief based on an invalid injunction. Both of the doctrines the carriers seek to challenge have long ago received the considered approbation of this Court. Since no reason has been set forth for their reconsideration at this point in time or in the context of this long and complicated litigation concerning fireman manning, it is submitted that the writ should be denied.

Respectfully submitted,

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APPENDIX A

Extract From The Decision Of The Court Of Appeals For The District of Columbia Circuit, May 12, 1967 In Brotherhood of Railroad Trainmen v. *Akron & B.B. R. Co.* (385 F. 2d 581, *cert. den.* 390 U.S. 923).

III

We turn now to the question to what extent and by what procedure the parties could and did lawfully invoke the machinery prescribed by the Railway Labor Act in order to change the work rules in effect on the railroads at the expiration of the Award, rules that had been prescribed by the Board (including the crew consist rules prescribed by various local boards).

As already stated, these work rules were not immutable. Congress had enacted a compulsory arbitration measure of limited duration. The appropriateness of a limited duration for a compulsory arbitration measure, articulated by the Supreme Court 50 years ago in *Wilson* v. *New*, had been emphasized by the President and Congress.[18]

When were the parties to bargain about possible changes in the work rules that survived the Award? All parties agree that negotiation during the pendency of Award 282 was permissible, but the carriers say it was not obligatory. In our opinion, however, bargaining during the pendency of the Award 282 was not merely a matter for the whim of the parties but was to be governed by provisions of the Railway Labor Act, and these provisions remained in effect during the life of the Award for purposes of regulating the responsibilities of the parties to bargain concerning changes proposed to become effective *after* the expiration of the Award.

The principles and objectives underlying Public Law 88-108 reveal that Congress placed a high premium on the opportunity for continued collective bargaining during the life of the Award, in the hope and expectation, appar-

[18] *See* note 10 *supra*.

ently shared at that time by the parties themselves, that the unions and carriers would themselves work out a long range solution to these sensitive problems by the traditional devices of collective bargaining. This special statute served to give the Nation a temporary respite from the threat of a disastrous national rail strike by forbidding for two years any unilateral changes or resort to self-help and imposing instead interim rules to cover the situation. But as we have seen, both the statute and the Award expressly contemplated that the parties were free to alter or extend the rules fixed by Award.[19]

Public Law 88-108 established a procedure for formulating rules to govern for up to two years, in the absence of a negotiated pact. This did not displace the otherwise applicable provisions of the Railway Labor Act on the duty to bargain on changes proposed to become effective subsequent to the two-year period. President Kennedy in his message to Congress expressed the desire that the parties continue to confer on the ultimate resolution of their disputes.[20] A chief spokesman for the carriers, Mr. J. E. Wolfe,[21] assured the Senate Committee that the carriers understood that the Administration's bill "imposes a duty on the parties to attempt to settle their differences" and would "protect the public interest as a result of the establishment of these interim rules for a period of 2 years or less while the parties undertake, through collective bargaining, to bring about a more permanent solution of the problems." [22] We are aware that in the reshaping of the measure the duty to bargain on the work rules was not expressly spelled out, but the plan was surely retained. Indeed the preambles of both measures expressly

[19] Indeed, on the crew consist issue, Section III.A(1) of the Award remanded the dispute to local properties "for negotiation", and only if these further efforts to reach a settlement proved pointless were special boards of adjustment to be convened to fix the temporary rules.

[20] *See Message from the President, supra* note 7, at 6-8.

[21] Chairman of the National Railway Labor Conference, an organization whose members conduct about ninety percent of all railway operations in the United States.

[22] *Hearings on S.J.Res. 102, Before the Senate Comm. on Commerce,* 88th Cong., 1st Sess., ser. 24, at 375 (1963).

and unequivocally proclaimed the care taken to select a system which solved the immediate emergency "in a manner which preserves and prefers solutions reached through collective bargaining." Changes were made by the Congress—notably the substitution of an independent *ad hoc* board for the Interstate Commerce Commission as the arbiter for the dispute.[23] There was not a breath of a suggestion, however, that Congress intended to remove or even downgrade the policy that the parties themselves should confer in order to reach long-range solutions through collective bargaining and agreement.

The carriers contend that all this means only that the parties were free to bargain during the Award if they wished, or even that they were encouraged to do so, but that for the two-year period the special act repealed pro tanto and by implication the duty under the Railway Labor Act to confer on proposed rule changes. We disagree. In our view Public Law 88-108 was intended to work the minimum disruption of permanent railroad legislation and normal collective bargaining. The only disruption wrought, the only "repeal by implication", was that which necessarily accompanied the objective of staving off a cataclysmic strike by imposing a temporary settlement. We detect no glimmer of an intimation that the carriers were authorized to regard this as a two year hiatus in their obligation to bargain. Rather, we find much to militate against such a construction.

It is notable that the parties to this dispute had already agreed to submit their controversy to arbitration. They stumbled over procedural details. Congress viewed its role primarily as draftsmen of the specifics of an arbitration agreement to which the carriers and unions had already agreed in principle.[24] The statute in Section 4, the Award in Part IV, and the reports of both congres-

[23] The Supreme Court referred to this substitution as the only "significant change" from the Administration bill. Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 432.

[24] *See* S. Rep. No. 459, 88th Cong., 1st Sess. 9 (1963); H.R. Rep. No. 713, 88th Cong., 1st Sess. 12-13 (1963); Brotherhood of Locomotive Firemen v. Chicago, B. & Q. R.R., 225 F. Supp. 11, 18 (D.D.C.) *aff'd*, 118 U.S.App.D.C. 100, 331 F. 2d 1020, *cert. denied*, 377 U.S. 918 (1964).

sional committees carefully specified that the effective duration of the Award was limited to no more than two years, unless extended by stipulation, in order to restrict the "scope and impact" of the statute.[25]

In essence then we have a mechanism tantamount to an arbitration agreement, albeit one drafted by Congress, that confers on the arbitrator the power to impose a settlement binding for up to two years. It becomes appropriate, then, to consider what would have been the rights and duties of the parties if they had themselves written the arbitration agreement. We are not concerned here with customary adjudicatory or grievance arbitration. Although so-called "legislative" arbitration agreements are relatively infrequent they are not unknown. Under such agreements, prospective rules and working conditions, instead of being determined by agreement of the union and employer, as is customary, are determined by an arbitrator to whom the function is delegated.[26] Such a determination by arbitration is equivalent to a determination by agreement insofar as the rights and duties of the parties concerning future modification are concerned. An arbitration award does not operate to "prevent the [parties] from seeking through negotiations under the procedures provided for by the Railway Labor Act or otherwise a new agreement . . . covering the rules. . ." [27]

Responsible conduct of the process of collective bargaining, for consideration of proposals to modify work rules established by an agreement or award of limited duration, embraces conference and consultation prior to the termination date. This is the way responsible businessmen deal with each other when they plan to continue a business relationship—for example, in negotiating on a contract or lease before its expiration date. This is the way responsible employers and unions implement the col-

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[25] S. Rep. No. 459, 88th Cong., 1st Sess. 10 (1963); *see* H.R. Rep. No. 713, 88th Cong., 1st Sess. 14-15 (1963).

[26] *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 30-47 (rev. ed. 1960).

[27] Sheehy, Ch.J., in Brotherhood of Railroad Trainmen v. St. Louis Sw. Ry., 220 F. Supp. 319, 325 (E.D. Tex. 1963).

lective bargaining process, and respond to calls for change. And this is the way railroads and railroad unions must respond under the mandate of the Railway Labor Act.

The purpose of a Section 6 notice is "to fix a procedure for the commencement of conferences between representatives of the two parties if changes are to be made in the contract." [28] No rigid form for these notices is defined in the statute.[29] All that is specified is thirty days written notice of a proposed change. The Act requires that within ten days a time and place for conference be set, and that the first conference be held within the 30-day period.

To recapitulate, the Railway Labor Act not only requires railway employers and unions to confer and bargain on work rules established by agreements or awards having a fixed expiration date when one party wants to change the rules, but permits the statutory machinery to be invoked *prior* to expiration in order to seek an agreement on changes to become effective on or after expiration.

If an agreement (or award) contains a fixed expiration date, rather than the common indefinite or automatic self-renewal term, then the notice must indicate a proposed effective date for changes that is not only at least thirty days after the notice, but also a time after the outstanding agreement or award expires. Nothing in the Railway Labor Act, or the scheme of Public Law 88-108, forbids service of a notice more than thirty days before the suggested rules would or could be effective, and nothing relieves the recipient from the duty to commence bargaining at that earlier stage.

The carriers seek to buttress their claim of pro tanto repeal by implication by arguing that it can hardly be supposed that Congress intended to permit the unions to ready themselves to strike on January 25, 1966. The only forecast of that day we can find in the legislative history is the assumption that it would be preceded by an agree-

[28] McMullans v. Kansas, O. & G. Ry., 229 F. 2d 50, 56 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956).

[29] *See* Detroit & T.S.L.R.R. v. Brotherhood of Locomotive Firemen, 357 F. 2d 152, 153 (6th Cir. 1966).

ment of the parties. And that in turn, in our view, assumes that responsible collective bargaining would have been in train some time prior to the expiration date. If we turn from speculation about legislative intent to the realities of the Railway Labor Act, we are aware that the conferences triggered by Section 6 notices are typically the beginning and not the end of the statutory procedures. If conferences proposed by a Section 6 notice are unavailing, either party can invoke the services of the National Mediation Board. While negotiations continue or the Board has jurisdiction, no self-help is permitted. The parties are free to submit their controversy to arbitration. If none of these techniques resolves the matter, the President may convene an emergency board to investigate the dispute and report back on the issues. Only when all these steps have been exhausted are the parties permitted to act unilaterally. "For the procedures of the Act are purposefully long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." [30]

We do not say that the time of service of notice is completely irrelevant to the duties of the parties. It may be that a notice served the day after the Award would betoken bad faith to the point of vitiating its validity. We shall have occasion to point out that certain union notices were defective for analogous reasons. But the mere fact that the union notices were served prior to January 25, 1966, did not relieve the carriers of their duty to confer and bargain prior to January 25, 1966. We are not considering a case where the railroads, while conceding that the unions had a right to begin bargaining prior to the expiration date, responded that the particular notice came too early, perhaps on the ground that it did not permit enough experience under the existing rules to spawn realistic and informed bargaining. In the case before us the carriers flatly refused to engage in any statutory bargaining whatever prior to the expiration date. Except in the

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[30] Brotherhood of Railway Clerks v. Florida E.C. Ry., 384 U.S. 238, 246 (1966). See also Farmer, *Compulsory Arbitration—A Management Lawyer's View*, 51 VA. L. REV. 396, 401-02 (1965).

case of objectionable union proposals discussed below, the carriers before us must be held to have breached their statutory duty under the Railway Labor Act to confer and bargain on the merits of proposed changes in work rules. The decree of the District Court embodies a contrary declaration, and to that extent it is reversed.

We now consider the effect of our reversal of the District Court's ruling that the notices were not effective to require negotiation until after termination of the Award. As we have seen, conferences are but the first step in the chain of Railway Labor Act procedures. Once they have been frustrated, one side to the dispute can move to the next tier of procedures, and indeed in at least one series of cases involving parties before us the National Mediation Board has accepted jurisdiction of the controversy. The carriers have forsaken their right to insist on conferences by their refusal to respect effective Section 6 notices. The standard for good faith bargaining is quite liberal. Certainly it does not compel agreement. Judge Bryan, after the most careful analysis, formulated the frequently quoted standard that the—

> requirement of good faith bargaining is really a requirement of absence of bad faith. In order to show such lack of good faith it is necessary to establish facts from which it can be reasonably inferred that a party enters upon a course of bargaining and pursues it with the desire or intent not to enter into an agreement at all. *American Airlines, Inc.* v. *Air Line Pilots Ass'n,* 169 F.Supp. 777, 794 (S.D.N.Y. 1958).

Applying such a test, the carriers have breached their duty to enter negotiations in good faith, for a refusal to bargain on an erroneous premise of law is no excuse.[31]

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[31] *See, e.g.,* Order of Railroad Telegraphers v. Chicago & Nw. Ry., 362 U.S. 330 (1960). We do not consider attempts to obtain new work rules incompatible with those imposed by the Award or with the report of the Presidential Emergency Board reflective of bad faith on the part of the unions. Compare Pullman Co. v. Order of Railway Conductors, 316 F. 2d 556 (7th Cir.), *cert. denied,* 375 U.S. 820 (1963).

APPENDIX B

Extract From The Supplemental Opinion Of The Court Of Appeals For The District of Columbia Circuit, July 31, 1967, In Brotherhood of Railroad Trainmen v. *Akron & B. B. R. Co.* (385 F. 2d 581, *cert. den.*, 390 U.S. 923).

III *Applicability of Section 8 of the Norris-LaGuardia Act.*

A. Brotherhood of Railroad Trainmen (BRT)

Appellant Union seeks a ruling that even assuming the District Court had jurisdiction to issue a restraining order, the issuance of the order reflected error in this case.

We are clear that the District Court was correct in holding that it had jurisdiction to enjoin a violation of the Railway Labor Act, and that this jurisdiction was not negatived by or subject to Section 4 of the Norris-La Guardia Act. We affirmed that conclusion in No. 20316, and fully adhere to that ruling.

Although the District Court had jurisdiction to issue the restraining order we think it erred in doing so because—as we subsequently held in our May 12, 1967 ruling—the complainant carriers had failed to comply with their obligations under the Railway Labor Act. Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108 (1964), provides that a federal court shall not grant a restraining order or injunction in a labor dispute where the complainant "has failed to comply with any obligation imposed by law which is involved in the labor dispute in question."

The issuance of the restraining order was conditioned on the carriers' posting a bond to make good damages, not to exceed $10,000, sustained by any party wrongfully restrained. We think the Union, which had to obey the injunction or suffer penalties for contempt of court, is entitled to a ruling from this court that vacates an erroneous determination of the District Court, although of course we do not purport to describe what if anything the Union is entitled to collect on the bond.

The District Court erred in concluding that because it held, correctly, that the action was not subject to Section

4 of the Norris-La Guardia Act, which would have ousted the court of jurisdiction, it necessarily followed that the "clean hands" provision of Section 8 of the Norris-La Guardia Act was likewise wholly inapplicable. The Supreme Court has said, speaking through the Chief Justice, that "there must be an accommodation" of this Act with the Railway Labor Act. Brotherhood of Railroad Trainmen v. Chicago R. & Ind. R.R., 353 U.S. 30, 40 (1957). That principle of accommodation means that actions to enjoin violations of the Railway Labor Act may be maintained without regard to Section 4 of the Norris-La Guardia Act, and yet be subject to Section 8 of that Act. That is the conclusion of other courts which have considered the matter,[4] and we agree. The point is, simply, that Congress did contemplate actions to effectuate the Railway Labor Act by enjoining violations.[5] That purpose would be utterly defeated if the federal court actions involved were subject to Section 4 of the Norris-La Guardia Act, which had provisions for withholding injunctions in labor disputes reflecting entirely different objectives.

On the other hand a ruling that Section 8 of the Norris-La Guardia Act is applicable to actions to enjoin violations of the Railway Labor Act would not trammel but would rather further the effectuation of that Railway Labor Act, for it ensures compliance by complainant carrier or union which cannot seek an injunction until and unless it has discharged the obligations imposed by the Railway Labor Act.

It may be that in a particular case the District Court might conclude that the imperatives of the Railway Labor

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[4] *See* Rutland Ry. v. Brotherhood of Locomotive Eng'rs. 307 F. 2d 21, 37-40 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); Chicago, Rock I. & Pac. R.R. v. Switchmen's Union, 292 F. 2d 61, 64-66 (2d Cir. 1961), *cert. denied*, 370 U.S. 936 (1962); Elgin, J. & E. Ry. v. Brotherhood of Railroad Trainmen, 302 F. 2d 540, 544-45 (7th Cir.), *cert. denied*, 371 U.S. 823 (1962); Manning v. American Airlines, Inc., 221 F. Supp. 301, 304-06 (S.D. N.Y. 1963); *cf.* Brotherhood of Railroad Trainmen v. Toledo P. & W.R.R., 321 U.S. 50, 60-65 (1944); Brotherhood of Railway Clerks v. Florida E. C. Ry., 384 U.S. 238, 247 n.8 (1966); Brotherhood of Railroad Carmen v. Chicago & N.W. Ry., 354 F. 2d 786, 794-96 (8th Cir. 1965).

[5] Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937).

Act override Section 8—a statutory focusing so to speak of an equity approach whereby lack of clean hands may be overcome by a balancing of interests, particularly where it is the public interest involved. In a particular case the District Court might conclude that the question of the applicability of Section 8 was doubtful, would require time to explore, and that the restraining order should issue forthwith to avoid jeopardizing the Railway Labor Act. Such approaches would recognize that Section 8 of the Norris-La Guardia Act has some applicability, and is a legislative instruction that weighs heavier in the scale than the clean hands doctrine taken merely as a general equity maxim, yet is overborne by requirements of the Railway Labor Act. Here, however, the approach of the District Court was that Section 8 of the Norris-La Guardia Act was completely inapplicable and that was error. In saying that the restraining order was erroneously entered, however, we do not mean that would excuse a contemptuous violation.

We have said enough to demonstrate that the approach used by the District Court was erroneous. As we have decided, the complainants lack clean hands and the defendants were not threatening the violation. Therefore, we now rule that the District Court, taking all circumstances into consideration, should permit the Union to recover on the $10,000 bond if indeed it can establish that it sustained ascertainable damage from the issuance of the restraining order.